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IN THE

Supreme Court of the United States

October Term, 1975
No. 74-958

UNITED STATES OF AMERICA, *et al.*,

Petitioners,

vs.

MAX JANIS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENT.

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BRIEF FOR THE RESPONDENT.

Opinions Below.

The findings of fact, conclusions of law and order of the district court (Pet App. 1A-11A) are not officially reported; however, said findings and conclusions are unofficially reported in *Janis v. United States*, 73-1 U.S.T.C. ¶16,083. The memorandum of affirmance of the court of appeals (Pet. App. 12A) is not officially reported.

Jurisdiction.

The judgment of the court of appeals (Pet. App. 13A) was entered July 22, 1974. A petition for rehearing was denied on September 5, 1974 (Pet. App. 14A). By order dated November 27, 1974, Mr. Justice Douglas extended the time for filing a petition for writ of certiorari to and including February 2, 1975 (a

Sunday). The petition for writ of certiorari was filed on February 3, 1975, and was granted on June 9, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

Question Presented.

Whether the exclusionary rule is applicable to a civil tax proceeding wherein the Government's wagering tax assessment is based solely upon evidence seized in violation of the taxpayer's Fourth Amendment rights.

Constitutional Provisions Involved.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides, in pertinent part, that:

> No person shall be . . . compelled in any criminal case to be a witness against himself.

Statement.

On November 26, 1968, the Los Angeles Police Department obtained a warrant directing a search for bookmaking paraphernalia at certain locations and on the persons of Max Janis, respondent, and one Morris Levine. The warrant was issued by a judge of the Municipal Court of the Los Angeles Judicial District, and was based upon an affidavit of an officer of the Los Angeles Police Department, one Leonard Weissman (Pltf. Exs. 1, 2; A. 67-74.)

Officer Weissman's affidavit in support of said search warrant provided in pertinent part as follows:

> Officer Weissman had been a police officer for the past 6½ years. On November 14, 1968, a confidential and reliable informant advised him (Officer Weissman) that bookmaking was being conducted over a telephone number 466-0363, and, in particular, that the respondent was taking bets over this telephone number. The informant further indicated that one Morris Levine was also involved and was participating in the same bookmaking activities, and that Levine sometimes handled bookmaking activities from the respondent's apartment. According to Officer Weissman, the informant (whose identity was not revealed in the affidavit), had never in the past given incorrect information, and information given by said informant had led to the arrest of two other persons on bookmaking charges.
>
> Using departmental facilities to check the telephone number supplied by the informant, Officer Weissman determined that the 466-0363 phone number and an additional phone number were both non-published numbers listed to the respondent. Officer Weissman further stated that, in his opinion, a bookmaker would be using non-published numbers for bookmaking activities.
>
> A check of the criminalistic records maintained by the Los Angeles Police Department revealed that respondent had three prior arrests for bookmaking and one prior arrest for conspiracy for bookmaking, which such arrests resulted in one

conviction for bookmaking. Morris Levine also had one prior conviction for bookmaking.

On November 21, 1968, Officer Weissman was informed by a fellow officer, Sgt. Briggs, that another reliable informant had told Briggs that respondent and Morris Levine were conducting bookmaking activities at one of the locations specified in the warrant. Officer Weissman indicated that this second informant had previously given the police information that resulted in at least two arrests and convictions for bookmaking activities. Based upon his experience as a police officer, and based upon the information supplied by the informants, Officer Weissman was of the opinion that the respondent and Morris Levine were conducting a bookmaking operation (Pltf. Ex. 2; A. 69-74).

Officer Weissman's affidavit in support of the search warrant did not contain any statement of the underlying circumstances from which the informants concluded that the respondent was conducting a bookmaking operation. The affidavit merely concluded that from the nature and extent of the information supplied by the informants, Officer Weissman believed that the informants had and were speaking with personal knowledge (Pltf. Ex. 2; A. 73). The affidavit did not detail the manner in which the informants gathered the information; nor was it alleged that either of the informants personally observed the respondent while engaged in bookmaking operations. The affidavit did not provide a neutral and detached magistrate with information which would dispel the possibility that the informants were merely relying on rumor.

On November 30, 1968, Los Angeles police officers conducted a search pursuant to the warrant issued on the basis of the aforementioned affidavit, and arrested respondent and Levine. Property belonging to the respondent was also seized, including $4,940.00 in cash, wagering records, markers and other documents. Shortly thereafter, Officer Weissman telephoned an Internal Revenue Officer, one Morris Nimovitz, and informed him that respondent had been arrested for bookmaking activities. According to Officer Weissman, it was his policy and the policy of others in the Los Angeles Police Department to notify the Internal Revenue Service whenever a "major-book" was discovered. Notifying the Internal Revenue Service in such a situation was a matter of "police procedure." (A. 42).

Revenue Officer Nimovitz responded to Officer Weissman's telephone call, appeared at police headquarters, and analyzed the materials seized pursuant to the warrant. Based solely on a review of those materials, Revenue Officer Nimovitz determined the gross volume of respondent's gambling activities for the five days immediately preceding his arrest. A Los Angeles police officer further informed Revenue Officer Nimovitz that he had conducted a surveillance of respondent's activities and that such surveillance indicated to him that respondent was engaged in bookmaking activities for a 77-day period from September 14, 1968 through November 30, 1968 (Pet. App. 3A-5A; A. 26-38).

Respondent had not filed any tax returns with respect to his alleged bookmaking activities for the period September 14, 1968 through November 30, 1968. Predicated upon its examination of the evidence obtained by the Los Angeles Police Department pursuant to the

warrant and upon the information pertaining to the alleged 77-day surveillance, the Internal Revenue Service made an assessment against respondent and Morris Levine on December 5, 1968, for wagering taxes under Section 4401 of the Internal Revenue Code of 1954 in the sum of $89,026.09, plus $123.97 of interest. The amount of the assessment was computed by determining respondent's average daily gross proceeds for the 5-day period covered by the material seized pursuant to the warrant, and multiplying the resulting figure by 77, the period of police surveillance of respondent's activities. The Internal Revenue Service would not have been able to compute and issue its assessment without the use of the material seized by the Los Angeles Police Department (A. 51). Additionally, the Internal Revenue Service levied upon and seized respondent's cash in the sum of $4,940.00, which such cash was in the custody of the Los Angeles Police Department as a result of its search pursuant to the subject warrant. The Internal Revenue Service would not have been able to levy upon such cash were it not for the seizure of same by the Los Angeles Police Department (A. 18-19).

Respondent and Morris Levine were prosecuted by local authorities for violation of local gambling laws. On February 18, 1969, they moved to quash the search warrant before the same Municipal Court judge who had originally issued the warrant. They contended that the affidavit in support of the warrant failed to set forth the underlying circumstances necessary to enable a magistrate to independently judge the validity of the information supplied by the informant. The court granted the motion to quash the search warrant and ordered that all items seized pursuant to the warrant be returned to respondent and Morris Levine, save and

except for the $4,940.00 in cash which was levied upon and seized by the Internal Revenue Service while said cash was in the custody of the Los Angeles Police Department (Pet. App. 3A-4A; Pltf. Ex. 4; A. 75-80).

On December 9, 1970, respondent filed his first amended complaint for refund of taxes in the United States District Court for the Central District of California, seeking a refund of the $4,940.00 collected under the levy in partial satisfaction of the $89,026.09 assessment (A. 8-9). Petitioners answered and counterclaimed for $84,210.06, the unpaid balance of the assessment, plus interest (A. 10-12).

In the pretrial conference order which was filed in the district court, the following facts were admitted:

> The Internal Revenue Service predicated its assessment of an excise tax deficiency against respondent solely upon items which had been seized by the Los Angeles Police Department pursuant to the aforementioned warrant and upon conversations had with representatives of the Los Angeles Police Department relating to the contents of the items seized pursuant to the search warrant and the duration of plaintiff's alleged wagering activities (A. 15-18).

The sole basis of the computation of the tax assessment against the respondent was, therefore, the items obtained pursuant to the search warrant and the information furnished to Revenue Officer Nimovitz with respect to the duration of plaintiff's alleged wagering activities (A. 15-18). Without reviewing the material seized pursuant to the warrant, the Internal Revenue Service would have had absolutely no factual basis upon which to establish its assessment (A. 50-51).

After reexamining Officer Weissman's affidavit in support of the search warrant, the district court held that said affidavit was insufficient under the cases of *Spinelli v. United States,* 393 U.S. 410 (1969), and *Aguilar v. Texas,* 378 U.S. 108 (1964) (A. 47). On the basis of the stipulated and admitted facts in the pretrial conference order, the court determined that all of the evidence utilized as the basis of the tax assessment was "obtained directly or indirectly as a result of the search pursuant to the defective search warrant . . .," and, as such, that the assessment was based upon evidence obtained in violation of the respondent's Fourth Amendment rights to be free from unreasonable search and seizure (Pet. App. 7A). The court further concluded that the presumption of validity attaching to the Internal Revenue Service's assessment had been rebutted by the respondent. The respondent had done more than simply allege invalidity or illegality; he had come forward to establish that there were no admissible facts to uphold the assessment, as said assessment was based solely upon illegally obtained evidence. The respondent-taxpayer, therefore, established his burden and overcame the presumption of validity of the assessment (A. 47-65).

Since the respondent-taxpayer had overcome his burden, and since the Internal Revenue Service did not come forward with any evidence other than the illegally obtained evidence, the district court concluded that the Internal Revenue Service could not prevail. As such, the court granted judgment for the respondent on his claim for refund and dismissed that government's counterclaim with prejudice. The United States Court of Appeals for the Ninth Circuit affirmed the decision of the district court (Pet. App. 12A).

Summary of Argument.

This case presents important constitutional questions concerning the application of the exclusionary rule to a civil tax assessment predicated *solely* upon evidence seized in violation of the respondent-taxpayer's Fourth Amendment rights.

The Invalid Warrant.

The search and seizure was made by local law enforcement officers pursuant to a constitutionally defective warrant. The warrant was issued on the basis of an affidavit of a local law enforcement officer, which affidavit stated in relevant part as follows:

> 1. An informant advised the affiant that the respondent was engaged in bookmaking activities, and that bookmaking was being conducted over certain telephone numbers;
>
> 2. The telephone numbers supplied by the informant were non-published numbers listed to the respondent;
>
> 3. Respondent had a prior record for bookmaking activities; and
>
> 4. A fellow law enforcement officer was informed by another informant that respondent was engaged in bookmaking activities.

The affidavit failed to set forth any of the underlying circumstances from which the informants concluded that the respondent was engaged in bookmaking activities. In *Aguilar v. Texas,* 378 U.S. 108 (1964), the Court held that an informant's report is insufficient to establish probable cause unless the affidavit sets forth the underlying circumstances from which the informant concluded that the defendant was engaged in

the illegal activity. The affidavit herein failed to set forth a single underlying fact to enable a magistrate to independently judge the validity of the informants' conclusions.

In *Spinelli v. United States,* 393 U.S. 410 (1969), the Court held that where the informant's report is insufficient under the initial *Aguilar* test, the magistrate should then examine the other allegations in the affidavit and determine whether they sufficiently corroborate the informant's conclusion. The only corroborative statements in the affidavit herein were that the telephone numbers supplied by the informant were listed to the respondent, and that the respondent was a known bookmaker with a prior record for bookmaking activity. The *Spinelli* Court was presented with identical corroborative allegations in the affidavit which it considered. It held that these additional allegations were not sufficient to cure the deficiencies of the affidavit. Therefore, the warrant herein was invalid, and the seizure of bookmaking paraphernalia violated the respondent's Fourth Amendment rights.

Application of the Exclusionary Rule to a Civil Tax Proceeding.

The local law enforcement officers conducted a search pursuant to the defective warrant and arrested respondent. Shortly thereafter, and as a matter of police procedure whenever a "major-book" was discovered, a local law enforcement officer summoned the Internal Revenue Service to review the items seized (A. 42). Based *solely* on the unconstitutionally seized evidence and fruits thereof, the Internal Revenue Service made its assessment for wagering taxes against respondent.

The Fourth Amendment does not distinguish between civil and criminal proceedings. It broadly states that the right of the people to be secure in their persons, houses and effects shall not be violated. The Court has long recognized that if the Amendment is to be preserved, governmental violation thereof cannot be tolerated.

Awareness of the need to deter governmental violation of the Fourth Amendment led to the judicially created exclusionary rule. As this Court has consistently held, the exclusionary rule should be invoked wherever unlawful police conduct violative of the Fourth Amendment will be deterred by its application. (See *Mapp v. Ohio,* 367 U.S. 643 (1961); *Elkins v. United States,* 364 U.S. 206 (1960)).

The record establishes that the Internal Revenue Service's involvement in this case did not come about as a mere afterthought following the seizure and arrest by local authorities. Rather, the Internal Revenue Service was called in as a matter of "police procedure" (A. 42).

It is well known and documented in other cases (see footnote 1, *infra*) that there is close cooperation between the Internal Revenue Service and other law enforcement agencies. This inter-governmental cooperation is a highly commendable enterprise when constitutional rights are not violated in the process. However, if the exclusionary rule is not applied in this case, inter-governmental cooperation will become a vehicle for unconstitutional subterfuge destroying the protections of the Fourth Amendment. Law enforcement officials will in effect be given a license to invade the privacy of a home or place of business knowing that even

though the evidence will be suppressed in a criminal trial, the unconstitutionally seized evidence will constitute the basis of a civil tax assessment. Governmental officials will be able to do indirectly through civil tax proceedings what this Court has clearly held to be impermissible when attempted in the criminal area. These officials will have no incentive to comply with the Fourth Amendment requirements whenever tax producing conduct is suspected. The privacy of the taxpayer's home will be continuously subject to invasion at the whim of such officials. More importantly, if the exclusionary rule is not applied in this case, the Internal Revenue Service itself will be free to send its agents into the homes and businesses of taxpayers, violating the protections of the Fourth Amendment.

The suggestion that the exclusionary rule applies only in the criminal area ignores the underlying rationale for the Court's creation of this protective sanction. Where application of the rule will deter future governmental violation of the Fourth Amendment, the rule should be applied regardless of the label attached to the proceeding.

The Assessment's Presumption of Validity Has Been Rebutted.

Respondent's complaint seeks a refund in the sum of $4,940.00; petitioners have denied liability with respect to said claim for refund, and, additionally, have counterclaimed for $84,210.06. Since the Government is seeking to collect taxes by virtue of its counterclaim, the counterclaim is tantamount to an independnt collection suit instituted by the taxing authority. Thus, within the framework of this litigation, respondent seeks a refund of taxes, while petitioners seek to collect taxes.

It is well settled that the Commissioner's tax assessment is presumptively correct for purposes of both a refund action and a collection suit. However, this presumption is rebuttable and only establishes a *prima facie* case of tax liability. *United States v. Rindskopf,* 105 U.S. 418 (1881); *United States v. Lease,* 346 F.2d 696 (2nd Cir. 1965). In defending against a collection suit, the taxpayer will prevail if he can establish that the assessment is erroneous or invalid. *Bar L Ranch v. Phinney,* 426 F.2d 995 (5th Cir. 1970). The respondent-taxpayer has established unequivocally that the underlying wagering tax assessment was based solely upon illegally obtained evidence (A. 17-18). Where an assessment is predicated solely upon such evidence, the Commissioner's determination is stripped of its presumption of correctness, and, as such, the Commissioner thereafter has the burden of going forward with untainted evidence to establish a tax liability. *Suarez v. Commissioner,* 50 T.C. 792 (1972). Since the Commissioner did not offer any evidence in these proceedings other than the illegally obtained evidence, the respondent-taxpayer must necessarily prevail and obtain judgment in his favor with respect to petitioners' counterclaim.

Petitioners assert that with respect to the refund portion of this litigation, respondent must not only prove that the assessment was invalid, but must also prove the amount of the refund to which he is entitled. Assuming, *arguendo,* that petitioners have correctly described respondent's burden, it is submitted that respondent has in fact established that he is entitled to receive a full refund of all money seized pursuant to the invalid assessment. The record in the court below

reveals that respondent has affirmatively and conclusively proven the following:

1. All evidence utilized by petitioners was illegally obtained.

2. Petitioners' knowledge of the alleged fact that there were bookmaking activities was the direct result of the illegally obtained evidence.

3. Petitioners' knowledge of the alleged fact that respondent was engaged in bookmaking activities was the direct result of the illegally obtained evidence.

4. The tax in question is an excise tax on bookmaking activities.

5. Since there was no admissible evidence whatsoever to establish that respondent was a bookmaker or that respondent was engaged in bookmaking activities, it necessarily follows that there is no wagering tax liability predicated upon such bookmaking activities (A. 17-18, 47-65).

Thus, the respondent-taxpayer has done everything necessary to prove that he is not liable for any wagering taxes whatsoever, and, as such, that he is entitled to a full refund. The record is void of any admissible evidence with respect to respondent being a bookmaker or being engaged in bookmaking activities. Since one cannot be presumed to be a bookmaker, it necessarily follows that respondent has met his burden and is entitled to a full refund.

Potential Forfeiture of Respondent's Fifth Amendment Rights.

Since the assessment is based solely upon illegally obtained evidence, and since such evidence itself suggests criminal violations, requiring the respondent-taxpayer to come forward with additional evidence in order to establish the propriety of his claim for refund violates his Fifth Amendment rights. By forcing the respondent-taxpayer to do more than attack the validity of the underlying assessment, the respondent must choose between asserting his Fifth Amendment rights or placing himself in a position of criminal jeopardy in order to obtain a civil refund. This choice is constitutionally impermissible. See *Spevack v. Klein,* 385 U.S. 511 (1967); *Garrity v. New Jersey,* 385 U.S. 493 (1967); and *Boyd v. United States,* 116 U.S. 616 (1886).

The procedural allocation of the burden of proof in the "normal" refund suit is not constitutionally suspect. However, where the underlying circumstances of the refund action are made criminal by local or federal law, and where the assessment itself is based solely upon illegally obtained evidence, requiring the taxpayer to do more than demonstrate the invalidity of the underlying assessment forces the taxpayer to choose between asserting his Fifth Amendment rights and incurring substantial tax liability to the Government. Such an allocation of the burden of proof would constitute an unconstitutional application thereof.

ARGUMENT.

I

The Government's Wagering Tax Assessment Was Based Solely Upon Evidence Obtained in Violation of the Respondent's Fourth Amendment Rights.[1]

A. Where an Affidavit Is Based Upon Information Supplied by an Informant, the Affidavit Must Set Forth the Underlying Circumstances From Which the Informant Concluded That the Suspect Was Engaged in the Proscribed Activity.

In *Aguilar v. Texas*, 378 U.S. 108, 114-115 (1964), this Court held:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones v. United States*, 362 US 257, 4 L Ed 2d 697, 80 S Ct 725, 78 ALR2d 233, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see *Rugendorf v. United States*, 376 US 528, 11 L Ed 2d 887, 84 S Ct 825, was 'credible' or his information 'reliable.' Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime. . . .'"

---

[1]Petitioners have conceded that "the assessment was based upon the fruits of an illegal search." (Petition for Writ of Certiorari at 7).

In *Spinelli v. United States*, 393 U.S. 410 (1969), this Court observed that the principles set forth in *Aguilar* should be further explicated. In *Aguilar*, a search warrant had issued upon an affidavit of police officers who swore only that they had received reliable information from a credible person and believed that narcotics were being illegally stored on the described premises. The *Aguilar* Court held the affidavit to be inadequate therein for two reasons:

> (1) The application failed to set forth any of the underlying circumstances necessary to enable the magistrate independently to judge the validity of the informant's conclusion that the narcotics were where he said they were; and
>
> (2) The affiant-officers did not attempt to support their claim that their informant was "credible" or his infomation "reliable."

The Court in *Spinelli* referred to these criteria as the "two-pronged *Aguilar* test." *Spinelli, supra*, at 412-413.

In *Spinelli*, the Court held that the informer's report must first be measured against the two-pronged *Aguilar* standards so that its probative value can be assessed. If the affidavit does not pass this initial test under *Aguilar*, the other allegations which corroborate the information contained in the hearsay report should then be considered by the magistrate. *Spinelli, supra*, at 415.

In the case at bar, Officer Weissman's affidavit failed to meet the two-pronged *Aguilar* test. Although the affidavit does in fact state that the informants were reliable and credible in that they had given prior truthful statements, the affidavit is absolutely void of any statements with respect to the underlying circumstances

necessary to enable the magistrate to independently judge the validity of the informants' conclusions.

In *Spinelli,* the affidavit in support of the search warrant stated that the FBI had been informed by a confidential, reliable informant that Spinelli was operating a handbook, accepting wagers and disseminating wager information by means of certain telephone numbers. Commenting on this portion of the affidavit, the Court in *Spinelli* said (at 417):

> ". . . Here, the only facts supplied [by the informant] were that Spinelli was using two specified telephones and that these phones were being used in gambling operations. This meager report could easily have been obtained from an offhand remark heard at a neighborhood bar."

Applying the above-quoted language to the case at bar, it is clear that Officer Weissman's affidavit was similarly defective. The affidavit merely stated that one of the informants indicated that the respondent was taking bets over two specific telephone numbers, and that the other informant indicated that the respondent was engaged in bookmaking activities. The affidavit failed to set forth the underlying circumstances upon which the informants based these conclusions. Therefore, as *Spinelli* clearly holds, the affidavit is insufficient unless other facts contained therein sufficiently support the informants' conclusions.

B. The Corroborative Information in Officer Weissman's Affidavit Is Insufficient With Respect to the Standards Set Forth in Spinelli and Aguilar.

The *Spinelli* Court observed that where the informant's statement is found inadequate under the *Aguilar* test, the other allegations which corroborate the information contained in the affidavit should then be considered. In particular, the Court held as follows (at 415-416):

> ". . . At this stage as well, however, the standards enunciated in *Aguilar* must inform the magistrate's decision. He must ask: Can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass *Aguilar's* tests without independent corroboration? *Aguilar* is relevant at this stage of the inquiry as well because the tests it establishes were designed to implement the long-standing principle that probable cause must be determined by a 'neutral and detached magistrate,' and not by 'the officer engaged in the often competitive enterprise of ferreting out crime.' *Johnson v. United States,* 333 US 10, 14, 92 L ED 436, 440, 68 S Ct 367 (1948). A magistrate cannot be said to have properly discharged his constitutional duty if he relies on an informer's tip which—even when partially corroborated —is not as reliable as one which passes *Aguilar's* requirements when standing alone."

In *Spinelli,* the affiant attempted to corroborate the informant's tip with the following information: that the

FBI had kept track of Spinelli's movements on five days; that on four of these occasions, Spinelli had been seen crossing a certain bridge and parking his car in a lot used by residents of a certain apartment; that a check with the telephone company revealed that this apartment contained the telephone numbers given by the informant; and that Spinelli was known to federal and local law enforcement agents as a bookmaker, as an associate of bookmakers, and as a gambler.

Commenting on the corroborative information described above, the Court, in *Spinelli,* held (at 418):

> "We conclude, then, that in the present case the informant's tip—even when corroborated to the extent indicated—was not sufficient to provide the basis for a finding of probable cause."

The Court specifically noted that the allegations detailing FBI surveillance of Spinelli and its investigations of telephone records contained no suggestion of criminal conduct when taken by themselves, and that these allegations are not endowed with an aura of suspicion by virtue of the informer's tip. The Court went on to state that the investigative reports cannot take on a sinister color when read in light of common knowledge that bookmaking is often carried on over the telephone and from premises used by others for perfectly normal purposes. With regard to the statement "Spinelli was a known bookmaker," the Court stated that this factual allegation is not itself a sufficient basis for a magistrate's finding of probable cause and that such a factual allegation could not be used to give additional weight to allegations which would otherwise be insufficient. *Spinelli, supra,* at 418-419.

The corroborative statements found in the affidavit of Officer Weissman were, as in *Spinelli,* insufficient to establish probable cause. The sole corroboration which Officer Weissman provided was that a check of one telephone number (non-listed), revealed that it was that of the respondent; that two other numbers were non-listed and in the name of Morris Levine; and that both the respondent and Morris Levine were known bookmakers. The defects and insufficiencies in the affidavit herein are precisely the defects and insufficiencies which were present in the affidavit before the *Spinelli* Court. Thus, it cannot be fairly said that the tips, even in light of these corroborative statements, are as trustworthy as a tip which would pass *Aguilar's* test without independent corroboration. The informants' tips and the corroborative statements failed to provide any underlying circumstances to a magistrate. There were no statements that the informants personally observed the respondent engaged in any bookmaking activities; nor were there any statements that either of the informants placed a bet with respondent.

The fact that Officer Weissman's affidavit contained statements of two informants is not significant, as each such tip was constitutionally defective under the tests set forth in *Aguilar* and *Spinelli.* It is axiomatic that an affidavit based on two informants' tips, each insufficient and uncorroborated with respect to the underlying defects described in *Aguilar* and *Spinelli,* fails to establish probable cause. Thus, the Los Angeles Municipal Court, the United States District Court and the unanimous United States Court of Appeals for the Ninth Circuit each correctly determined that the affidavit herein was insufficient, and, as such, that the warrant based thereon was invalid.

II

The Fourth Amendment Applies to the People of the United States Generally. In Order to Deter Governmental Infringement of the Fundamental Rights Contained Therein, the Exclusionary Rule Should Be Applied to Civil Tax Proceedings.

The Fourth Amendment provides in pertinent part as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated. . . ." U.S. Const. amend. IV.

This is the cherished command of the Fourth Amendment. The right of the American people to be left in undisturbed possession of their effects unless valid authority for intruding thereon can be demonstrated on recognized principles of law is basic to our society (*e.g.*, see *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969). Thus, the American view of ordered liberty rests on the cornerstone of privacy.

The Fourth Amendment is silent as to the devices by which its commandments are to be observed. However, as the cases set forth below reveal, this Court has long recognized that if the Amendment is to be preserved, governmental violation thereof cannot be tolerated.

The Court's awareness of the need to protect the people within the bounds of the Fourth Amendment by deterring the incentive of governmental officials to violate the Amendment led to a judicially created sanction, the exclusionary rule. An analysis and historical perspective of the development, application and rationale of the exclusionary rule as enunciated by this Court will demonstrate that the application of the exclusionary rule to this case is necessary to protect the respondent's Fourth Amendment rights and to deter future official action which would render the Amendment rhetoric without substance.

The logical starting point is *Weeks v. United States*, 232 U.S. 383 (1914). The Court therein established the rule that in a federal criminal prosecution, evidence obtained by federal agents in violation of a defendant's Fourth Amendment rights must be suppressed. Thus, the Court held (at 391-393):

> "The effect of the Fourth Amendment is to put the courts of the United States and federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. *This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws.* The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights . . .

". . . If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." (Emphasis added).

Subsequent to the decision in *Weeks*, and for approximately the next 35 years, the Court determined that where articles had been illegally seized by local law enforcement officials as opposed to federal officials, the evidence could be introduced by the federal prosecutor because, in the Court's view at that time, "the Fourth Amendment is not directed to individual misconduct of such (state) officials." *Weeks, supra,* at 398; see also *Byars v. United States,* 273 U.S. 28 (1927). In 1949, the Court decided *Wolf v. Colorado,* 338 U.S. 25 (1949) [the ultimate determination of which, *i.e.,* that the exclusionary rule was not constitutionally imposed upon the States through the vehicle of the Due Process Clause of the Fourteenth Amendment, was reversed by this Court, in *Mapp v. Ohio,* 367 U.S. 643 (1961)]. The unanimous Court in *Wolf,* however, determined that the Constitution of the United States, by virtue of the Fourteenth Amendment, prohibited state officials from unreasonable searches and seizures. The Court therein held (at 27-28):

"The security of one's privacy against arbitrary intrusion by the police . . . is . . . implicit in the 'concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."

Then, in *Elkins v. United States,* 364 U.S. 206 (1960), the Court reexamined the dangers created by a rule which allowed the federal prosecutor to use evidence illegally seized by state officials. It pointed out that the practice of state and federal agents cooperating in the investigation and detection of criminal activity was a highly commendable enterprise; however, the admissibility of evidence in a federal trial dependent only upon who had violated the Constitution was undermining the Fourth Amendment itself. Thus, the Court stated((at 215):

". . . For surely no distinction can logically be drawn between evidence obtained in violation of the Fourth Amendment and that obtained in violation of the Fourteenth. The Constitution is flouted equally in either case. To the victim it matters not whether his constitutional right has been invaded be a federal agent or by a state officer. It would be a curiously ambivalent rule that would require the courts of the United States to differentiate between unconstitutionally seized evidence upon so arbitrary a basis."

In defining the basic postulate of the exclusionary rule, the Court in *Elkins* held (at 217-218):

"The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively avail-

able way—by removing the incentive to disregard it. See *Eleuteri v. Richman*, 26 NJ 506, 513, 141 A2d 46, 50. Mr. Justice Jackson summed it up well:

> 'Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.
>
> 'Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty.' "

Petitioners assert that the exclusionary rule is inapplicable to this case because "it seems unreasonable and unnecessary to deprive innocent parties to civil litigation of relevant evidence because of conduct of third parties having no interest in the litigation." (Brief for Petitioners, at 29). In *Elkins*, the Court specifically directed itself to the type of unconscionable subterfuge that would develop if federal officials were allowed to withdraw from direct investigations and tacitly encourage and wait for state officials to violate Fourth

Amendment rights, and thereafter summon the federal agents. In particular, the Court stated (at 221-222):

> "Free and open cooperation between state and federal law enforcement officers is to be commended and encouraged. Yet that kind of cooperation is hardly promoted by a rule that implicitly invites federal officers to withdraw from such association and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom. If, on the other hand, it is understood that the fruit of an unlawful search by the state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation. Instead, forthright cooperation under constitutional standards will be promoted and fostered."

The rule of *Elkins* was further expanded in *Preston v. United States*, 376 U.S. 364 (1964), wherein the Court held (at 366):

> "The question whether evidence obtained by state officers and used against a defendant in a federal trial was obtained by unreasonable search and seizure is to be judged as if the search and seizure had been made by federal officers."

In the case at bar, the respondent's papers and effects were seized by local officials in a manner violative of his Fourth Amendment rights. The Internal Revenue Service's involvement in this matter was neither fortuitous nor accidental. Acting in accordance with his customary policy when discovering bookmaking activity of significant amounts, Officer Weissman sum-

moned the Internal Revenue Service to review the evidence which had been seized[2] (A. 42). Based *solely* on the unconstitutionally seized evidence and the fruits of unconstitutional evidence, the Internal Revenue Service made the tax assessment herein (Finding of Fact No. 8; A. 17-18, items "I" and "K").

The rationale of *Elkins* and *Preston* is particularly applicable to the present action. If the exclusionary rule is not applied, law enforcement officials will in effect have a license to violate individuals' Fourth Amendment rights whenever there is suspected activity that has adverse tax consequences to the potential defendant. Thus, officials would be in a position to proceed on the premise that even though the tainted evidence may be inadmissible in a criminal prosecution, never-

[2]Close cooperation between the Internal Revenue Service and law enforcement agencies is not unique to this case. See Silver, *Terminating the Taxpayer's Taxable Year: How the Internal Revenue Service Uses It Against Narcotics Suspects,* 40 J. Tax. 110 (1974). Silver cites an Internal Revenue Service Manual Supplement (dated Nov. 10, 1971) which sets out the procedures of the Internal Revenue Service Narcotics Project used to disrupt narcotics traffic. Silver states (*Id.* at 110):

> "Under current Internal Revenue Service guidelines, whenever a taxpayer is arrested who is suspected of trafficking in narcotics or marijuana, an Internal Revenue Service narcotics squad, headed by a Special Agent and consisting of a Revenue Officer and Revenue Agent, immediately goes into action. Oftentimes, Service personnel will be notified by local law enforcement in advance of an arrest, and in many of the instances the Service team members are present at the time of the arrest."

It is common for law enforcement officers to notify the Internal Revenue Service whenever cash is seized pursuant to a gambling raid, and for assessments to be issued within a very short time thereafter. See affidavit from ten attorneys, *United States v. Marshall,* No. 74-227 (C.D. Cal., May 13, 1974), appeal docketed, No. 2070, 9th Cir., June 7, 1974). [Tarlow, *Criminal Defendants and Abuse of Jeopardy Tax Procedures,* 22 U.C.L.A. L.Rev. 1191, 1192 (1975)].

The fact that law enforcement officers summon the Internal Revenue Service is also evidenced by the following reported cases:

theless it will be admissible as the basis of a subsequent civil tax assessment. Law enforcement officials will be able to accomplish indirectly what this Court has clearly held to be constitutionally impermissible when done directly [*e.g.*, see *Elkins*]. Contrary to the position taken by the petitioners, there will be great incentive on the part of law enforcement officials to make searches and seizures which in the criminal context would be unconstitutional. It is obvious that the imposition of substantial tax liability will have a deterrent effect upon present and future illegal activity, at least equal to the deterrent threat of incarceration, and, consequently, law enforcement officials will have the motivation to make the searches and seizures. Furthermore, if the exclusionary rule is not applied herein, law enforcement officials will have no incentive to comply

> *United States v. Bonaguro,* 294 F.Supp. 750, 751 (E.D. N.Y. 1968) (Secret Service officer testified that when large amounts of currency are seized, the usual policy is to call in the Internal Revenue Service); *Rinieri v. Scanlon,* 254 F.Supp. 469 (S.D. N.Y. 1966) (Federal Narcotics Bureau agents seized cash from defendant and immediately turned the money over to the Internal Revenue Service); *Clark v. Campbell,* 501 F.2d 108 (5th Cir. 1974) (Court noted in footnote 28 at 117 that Internal Revenue Service works in conjunction with the BNDD to assess a deficiency tax in nearly the amount of money or property seized); *Willits v. Richardson,* 497 F.2d 240, 243 (5th Cir. 1974) (taxpayer arrested by Miami police; search of her purse revealed narcotics and approximately $4,400.00 in cash; Internal Revenue Service was immediately notified and deficiency tax was assessed).

The above cited cases, authorities and statements by Officer Weissman demonstrate that the Internal Revenue Service has a close working arrangement with law enforcement agencies. If the exclusionary rule is not applied herein, other enforcement agencies will have incentive to violate taxpayers' Fourth Amendment rights, knowing that the Internal Revenue Service will be able to make use of the constitutional invasions. Therefore, the petitioners' argument that application of the exclusionary rule herein would have only a "minimal and speculative" deterrent effect is without merit.

with such constitutional safeguards as now required by *Spinelli*, *Aguilar* and *Elkins*, among others, at least in the area of criminal activities producing tax liabilities. Carrying this analysis to its logical conclusion, if the exclusionary rule is not applied, law enforcement officials will not be constrained by the present requirement of obtaining a warrant at all, let alone one that sets forth sufficient facts from which a neutral magistrate could find probable cause. More importantly, if the exclusionary rule is not applied in this case, the Internal Revenue Service itself will be free to send its agents into the homes and businesses of taxpayers, violating the protections of the Fourth Amendment.

There is little reason to believe that law enforcement officers in this case or cases involving similar criminal tax producing conduct would comply with the well-established constitutional safeguards which are integrally related with the Fourth Amendment when the same result could be reached indirectly without the many preliminary steps. The Fourth Amendment is presently a vital force only because this Court has supported it with a sanction deterring violation of the Amendment's commands (suppression of illegally seized evidence). If the exclusionary rule is not applied in the case at bar, the mandate of the Fourth Amendment will become mere rhetoric.

In applying the exclusionary rule to the States in *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court specfically noted that a federal prosecutor could not use illegally obtained evidence but a state attorney across the street could, although he was supposedly operating under the enforceable prohibitions of the same Amendment. Thus, pre-*Mapp*, a State by admitting evidence unlawfully seized served to encourage disobedience to the Federal Constitution which it was bound to uphold. The *Mapp* Court recognized that it was intolerable to allow one branch of the government to make active use of local law enforcement's unconstitutional activity, and, in connection therewith, stated (at 658):

> "Federal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches. However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness. [Citations]. Denying shortcuts to only one of two cooperating law enforcement agencies tends naturally to breed legitimate suspicion of 'working arrangements' whose results are equally tainted."

The position asserted by the petitioners would serve to encourage the very same disobedience to the Constitution which the Court in *Mapp* sought to redress. In effect, the Government contends that although Mr. Janis has protectable Fourth Amendment rights in a criminal prosecution, when he enters the Tax Court or a United States District Court on a tax-related matter, the basis of which involves alleged criminal conduct, he leaves his Fourth Amendment rights at the doorstep. A healthy federalism with separate criminal and civil proceedings cannot tolerate the illogical dichotomy asserted by the petitioners.

By way of analogy, it has long been recognized by this Court that one may assert his Fifth Amendment rights in any proceeding, criminal or civil, because the danger which the Amendment seeks to shield against can arise in either type of proceeding.[3]

Similarly, the language of the Fourth Amendment itself states that the "people shall be secure . . ." The Court in *Weeks* recognized (at 392):

> "This protection (the Fourth Amendment) reaches all alike, whether accused of crime or not and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws." Also cited with approval in *Elkins,* 364 U.S. at 209.

Where application of the exclusionary rule will deter conduct impermissible under the Fourth Amendment, the type of proceeding involved is wholly irrelevant.

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[3]The Court, in *In Re Gault,* 387 U.S. 1, 49 (1967), held with respect to availability of the privilege:

> ". . . [It] does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites. The privilege may, for example, be claimed in a civil or administrative proceeding. . . ."

In *Romanelli v. C.I.R.,* 466 F.2d 872 (7th Cir. 1972), a taxpayer was interrogated in violation of his Fifth Amendment rights for failure to provide him with his *Miranda* warnings. The issue before the court therein was whether the taxpayer's statements so obtained could be used in a civil tax proceeding to establish the Government's case concerning the tax liability. In holding that the evidence could not be used, the court stated (at 879):

> ". . . [W]e prefer the policy judgment that exclusion from establishing the Government's civil case is an appropriate and desirable deterrent . . . To permit them [the government agents] so proceeding, to infringe upon Romanelli's constiutional protection against self-incrimination, to an extent that the right to use his statements to establish a criminal charge was forfeited, but to award the advantage of using his statements in establishing a civil liability seems unwholesome and an abuse of power."

The evil that the exclusionary rule seeks to deter can arise in both civil and criminal proceedings. The petitioners have characterized the position taken by the respondent, the United States District Court and a unanimous Ninth Circuit Court of Appeals as an "unwarranted extension of the exclusionary rule." On the contrary, based upon the rationale expressed in every opinion by this Court, applying the exclusionary rule in this case is a natural and necessary application. The rule is a judicially created sanction designed to protect Fourth Amendment rights by deterring the incentive to violate those rights. Whether the incentive be in the form of criminal penalties or civil tax assessments matters not.

The decision of *Camara v. Municipal Court of the City and County of San Francisco,* 387 U.S. 523 (1967), holding that a search warrant must be obtained before inspecting homes for compliance with local ordinances, establishes that the Fourth Amendment mandate that the people shall be free from unreasonable searches is not limited to the criminal area. Admittedly, most cases involving unreasonable searches arise in the criminal as opposed to the civil context. This, however, in no way diminishes the scope or application of the Fourth Amendment where an unconstitutional search takes place and the fruit thereof is the sole basis of the governmental civil action. Where the effect of applying the exclusionary rule will deter unconstitutional conduct, the rule should be applied regardless of the label of the particular proceeding.

Although the issue of the applicability of the exclusionary rule to a civil tax proceeding is a case of first impression before this Court, lower courts, including

state, federal and the Tax Court, have consistently applied the rule to civil proceedings. In *Berkowitz v. United States,* 340 F.2d 168 (1st Cir. 1965), the taxpayer was criminally prosecuted for violating a federal wagering tax statute. A motion to suppress evidence unlawfully obtained from the taxpayer in violation of his Fourth Amendment rights was sustained by the trial court. Thereafter, the Government filed a civil action in the form of a libel for the forfeiture of the money which had been seized by the Government at the time the taxpayer's Fourth Amendment rights had been violated. In answer to the libel, the taxpayer maintained that the money was his and that his Fourth Amendment rights had been violated. In upholding the taxpayer's position, the *Berkowitz* court held (at 170-171):

> ". . . What emerges from these resounding declarations [*Weeks, Mapp,* etc.] is the rule that even where there is present the very great interests of society first, in adjudging the conduct of a defendant charged with the most reprehensible crimes, and second, in disabling him if guilty from continuing as a menace to the peaceful existence of the rest of us, nonetheless, unconstitutionally seized evidence may not be used to convict him. The safety of our society depends more upon the preservation of fundamental liberties than upon the punishment of a person whose offense we can prove only through subverting those liberties . . .
>
> ". . . What the Government is seeking in the case at bar is to put its interest in forfeiting some money which was used to commit a crime ahead of the public interest in keeping the action of Government agents within Constitutional boundaries."

The court in *Berkowitz* went on to hold that if the seizure of the taxpayer's money was in violation of his Fourth Amendment rights, then the Government should not be allowed to benefit from the constitutional infringements.

In the instant action, the Government seeks to put the interests of tax assessment and collection ahead of constitutional rights. The assessment herein was predicated solely on the basis of unconstitutionally obtained evidence, without which the Government would have been unable to make its assessment (A. 17, 18, 51). It is highly anomolous to suggest that although known and suspected criminals may assert their Fourth Amendment rights where there have been constitutional invasions, civil litigants may not do likewise.

In *United States v. Blank,* 261 F.Supp. 180 (N.D. Ohio 1966), the court was presented with the issue of the applicability of the exclusionary rule to a civil tax proceeding. Internal Revenue agents had searched the taxpayer's premises in violation of his Fourth Amendment rights. In the criminal proceeding brought against him, a motion to suppress the evidence was granted. Subsequent thereto, the taxpayer was informed that the Internal Revenue Service was assessing a substantial tax against him predicated upon the materials seized. The position taken by the Government was that since the assessment proceeding was civil, the taxpayer had no Fourth Amendment rights and the exclusionary rule was inapplicable. The court responded to this contention as follows (at 182):

> "We must first approach the exclusionary rule under attack here by the Government. The purpose of the exclusionary rule is to put teeth into the Fourth Amendment; the rule is the only effi-

cacious sanction whereby courts may deter the unbridled plunder of private property by law enforcement officials. As stated by the Supreme Court in *Mapp v. Ohio,* 367 U.S. 643, 656, 81 S.Ct. 1684, 1692, 6 L.Ed.2d 1081 (1961), to withhold the sanction of excluding illegally seized evidence 'is to grant the right but in reality to withhold its privilege and enjoyment.' The necessity of withholding evidence which law enforcement officials secure by illegal means 'is to deter —to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' *Elkins v. United States,* 364 U.S. 206, 217, 80 S.Ct. 1437, 1444, 4 L.Ed.2d 1669 (1960). . .

"For reasons too clear, we cannot agree with the Government. Where, as here, there is a correlative civil action open to the Government which imposes a penalty upon the citizen commensurate with the criminal sanctions to which an accused, victimized by an illegal search would be exposed, then we see no distinguishable difference between the two forms of punishment which excuses the Government from complying with constitutional mandates when prosecuting their action in a civil form. *Were this not the case, all suspected violators of revenue laws would be subject to the precise evil at which the Fourth Amendment is directed—the unreasonable disruption of the privacy of the home—no matter how slim or unfounded might be suspicion of their illegal activity.* If there is no constitutional check on the 'investigative' efforts of federal administrative officials prosecuting civil claims, and there exist forfeiture and deficiency proceedings, civil in form, which inflict an onerous monetary penalty upon an accused which approximates the visitations of the criminal code, there is no rule of reasonableness. *Searches can be instigated at the capricious whim of any administrative official or enforcement agent rather than as a result of the informed deliberation of 'a neutral and detached magistrate.' Giordenello v. United States,* 357 U.S. 480, 486, 78 S.Ct. 1245, 2 L. Ed.2d 1503 (1958). If these speculative suspicions prove to be accidentally accurate, and the invasion force discovers evidence of activity which is both offensive to the criminal code and also indicative of evasion of taxes or tariffs accountable in a civil proceeding, the Government need not bother with criminal proceedings and may avoid the exclusionary rule embodied in Rule 41 of the Federal Rules of Civil Procedure. If the Government's assessment of the boundaries of the Fourth Amendment is correct, then it may take the accused down a civil avenue to impose its penalties while keeping itself free from the impinging requirement of reasonableness which the Fourth Amendment imposes." (Emphasis added).

The fact the federal agents in *Blank* were the ones who violated the taxpayer's Fourth Amendment rights is not determinative of the issue herein. As set forth above, *Elkins* and *Preston* clearly laid to rest the idea that federal officials could tacitly await Fourth Amendment violations by local officials and then benefit from those violations.

The court in *Blank* further observed that although the tax assessment is civil in nature, where it is based on alleged criminal activity, it involves the very de-

termination present in the criminal proceedings. The court held (at 184):

> "The success of the Government's attempted deficiency assessment for non-payment of federal excise taxes requires 'the determination that the criminal law has been violated,' to wit, that the movant has been in the business of accepting wagers without registering with the Internal Revenue, without submitting his daily records to their scrutiny, and without paying the excise tax. Consequently, we do not think that federal officials may elect to proceed in an administrative forum and 'by this device take from the proceeding its criminal aspect and deprive' the accused of the privileges which the Constitution purports to secure for him. We hold that the contemplated imposition of taxes and penalties upon the movant is an action 'for penalties incurred by the commission of offenses against the law' and that the accused is entitled to all that the Fourth Amendment guarantees to him."

In *Suarez v. Commissioner*, 50 T.C. 792 (1972), the United States Tax Court was presented with the precise issue which is before this Court. Due to the similarity of the facts in *Suarez* to the case at bar, and due to the court's elaborate and carefully reasoned analysis therein, a detailed discussion of *Suarez* is relevant.

Local law enforcement officers conducted a search of Mr. Suarez' business premises. During the search, the local officers seized his daily records, $2,650.00 in cash, medical instruments, promissory notes, jewelry, car titles and other disputed records. *Suarez*, at 798. As a result of the search and seizure, Suarez was

charged with conspiracy to perform an abortion and attempting to produce the miscarriage of a woman.

According to the stipulated facts, the Internal Revenue Service learned of the raid on Suarez' business premises through the news media and subsequently arranged a meeting with local law enforcement officials. As in the present case before this Court, the parties in *Suarez* stipulated that the evidence seized in the raid was the sole basis of the proposed assessment.

Subsequent to Suarez' state criminal conviction, the United States District Court granted his writ of habeas corpus on the ground that the evidence obtained in the raid was the product of an unlawful search, and, as such, should have been suppressed at trial. Thereafter, the Tax Court heard Suarez' motion to strike the affirmative allegations of the Government's amended answer and to suppress the evidence. These motions were made on stipulated facts that the proposed assessment was based solely on the evidence unconstitutionally seized during the raid.

The Tax Court granted both the taxpayer's motion to strike the Government's affirmative allegations which were based on the unconstitutionally seized evidence and the motion to suppress all of the evidence so seized. In doing so, the court reviewed the history and rationale of the exclusionary rule, discussing the decisions set forth in *Weeks*, *Mapp* and *Elkins*. The Tax Court stated (at 802):

> "Thus far the high court [sic] has not faced the exact issue presented herein. But it has repeatedly stated that the rule's purpose is to deter unconstitutional conduct, and its prior opinion, as well as decisions by other Federal courts, clearly

delineate the path we should follow. Thus in *Weeks v. United States, supra,* the Court, in commenting on the scope of protection afforded by the Fourth Amendment, stated (232 U.S. at 392):

> 'This protection reaches all alike, *whether accused of crime or not,* and the duty of giving to it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws . . .'

"And in *Camara v. Municipal Court, supra,* which involves a warrantless search pursuant to the San Francisco Housing Code, the Court said (356 U.S. at 530):

> '[W]e cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely 'peripheral.' It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.' "

The Tax Court in *Suarez* observed that the Second Circuit Court of Appeals was faced with the question of the Fourth Amendment's applicability in a civil tax case in *Pizzarello v. United States,* 408 F.2d 579 (2nd Cir. 1969). *Pizzarello* involved a taxpayer's action seeking to enjoin the levy of a jeopardy assessment for unpaid wagering taxes on money illegally seized by the Government. In reversing the lower court's order denying the injunction, the court said (at 586):

> "This case, however, while civil in nature is not between private parties and there are no analogous independent deterrents to, or remedies against, government violations of the Fourth

> Amendment. The prohibition against unreasonable searches and seizures is directed at governmental action. Absent an exclusionary rule, the Government would be free to undertake unreasonable searches and seizures in all civil cases without the possibility of unfavorable consequences. In such a situation, while the matter has not been settled by Supreme Court decision, it seems clear, even under a view of the law most favorable to the Government, that evidence so obtained would be excluded. Because Pizzarello's tax assessment was based in substantial part, if not completely, on illegally procured evidence, the assessment is invalid."[4]

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[4]The following cases have also applied the exclusionary rule to civil proceedings:

Knoll Associates, Inc. v. F.T.C., 397 F.2d 530 (7th Cir. 1968 (stolen documents could not be used by Government in F.T.C. proceeding); *Powell v. Zuckert,* 366 F.2d 634 (D.C. Cir., 1966) (illegally obtained evidence could not be used in civilian discharge proceeding); *Rogers v. United States,* 97 F.2d 691 (1st Cir. 1938) (civil tax judgment based on constitutionally tainted evidence is invalid); *Laprease v. Raymours Furniture Company,* 315 F.Supp. 716 (N.D. N.Y. 1970) (sheriff in replevin action could not seize chattel without intervention of judicial officer, because to do so would violate the Fourth Amendment); *State of Iowa v. Union Asphalt & Roadoils, Inc.,* 281 F.Supp. 391 (S.D. Iowa 1968) affirmed sub. nom. *Standard Oil Company v. State of Iowa,* 408 F.2d 1171 (8th Cir. 1969) (government officials seized material in violation of Fourth Amendment and were prohibited from using that evidence in a civil anti-trust action); *United States v. Stonehill,* 274 F.Supp. 420 (S.D. Cal. 1967), affirmed 405 F.2d 738 (9th Cir. 1968) (failed to apply exclusionary rule to tax case *only* due to fact that the underlying illegal search was conducted by Mexican officials, and, therefore, there would be no deterrent effect); *Lassoff v. Gray,* 207 F.Supp. 843 (W.D. Ky. 1962) (assessment of tax based solely on illegally obtained evidence indicating that taxpayer was engaged in bookmaking was invalid and illegal); *Anderson v. Richardson,* 354 F.Supp. 363 (S.D. Fla. 1973) (government enjoined from attaching taxpayer's assets based on jeopardy

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The court in *Suarez*, in holding that the protective rule of the Fourth Amendment which excludes evidence illegally obtained is applicable to a civil tax case, stated (at 805-806):

> "We are not unmindful of the competing considerations involved in applying the protection of the Fourth Amendment. See Amsterdam, 'Search and Seizure and Section 2255: A Comment,' 112U. of Pa. L. Rev. 378, 388-389 (1964). But, the language of the Fourth Amendment itself admits of no distinction between searches and seizures in the context of a criminal case and those made in the context of a civil case. Indeed, it speaks in terms of the proscribed conduct without any apparent regard to the motivation for such conduct or the use of the fruits thereof . . .
>
> "The costs to society of applying the exclusionary rule in civil tax cases are substantially less than in the criminal area where the rule is well established. Surely the lesser objective of civil tax collection should not be accorded preferential treatment over the greater objective of convicting the guilty criminal. Moreover, we cannot ignore the additional factor that the integrity of the judicial process is also at stake. See *Mapp v. Ohio, supra,* 367 U.S. at 659 (1961); *Elkins v. United States, supra,* 364 U.S. at 222 (1960).
>
> "In view of the foregoing, we conclude that any competing considerations based upon the need for effective enforcement of civil tax liabilities (compare *Elkins v. United States, supra,* 364 U.S. at

assessment where assessment was based on unconstitutionally seized evidence); also see the annotation, "Admissibility in Civil Case, of Evidence Obtained by Unlawful Search and Seizure," 5 A.L.R. 3d 670, 678-683.

> 222) must give way to the higher goal of protection of the individual and the necessity for preserving confidence in, rather than encouraging contempt for, the processes of government . . .
>
> "We hold that, as a matter of law, the protective rule of the Fourth Amendment which excludes evidence illegally obtained is applicable in a civil tax case."

Petitioners cite *United States v. Calandra,* 414 U.S. 338 (1974), as authority for their position that the exclusionary rule in inapplicable to this case. In *Calandra,* this Court was presented with the issue of whether a grand jury can bring an indictment based upon unconstitutionally seized evidence. In determining that the grand jury could use such evidence, this Court noted that the grand jury is not an adversary hearing in which liability is determined, but rather it is an *ex parte* investigation to determine whether probable cause exists for instituting another proceeding in which the defendant has full constitutional safeguards. *Calandra,* at 344. Thus, the Court stated (at 351):

> "The incentive to disregard the requirement of the Fourth Amendment solely to obtain an indictment from a grand jury is substantially negated by the inadmissibility of the illegally seized evidence in a subsequent criminal prosecution of the search victim."

Unlike *Calandra,* the case at bar involves an adversary proceeding in which liability is determined. Unlike *Calandra,* the respondent herein does not have the opportunity to assert his constitutional arguments in a subsequent proceeding. Unlike *Calandra,* applying the exclusionary rule here will have a significant deterrent

effect upon future unconstitutional violations of the Fourth Amendment. The rationale of this Court in *Calandra*, therefore, does not support the Government, but, on the contrary, constitutes authority for the position asserted by respondent herein.

Unless the exclusionary rule is applied in this case, there will be no counterveiling force to deter the incentive to violate the Fourth Amendment whenever supposed criminal conduct gives rise to tax liability. Governmental officials will in effect be given a license to conduct illegal searches and seizures in the hope that such searches will result in the imposition of a tax against one whose constitutional rights have been violated.

III

A Civil Tax Assessment Is Only Presumptively Correct. Since Respondent Has Established That the Assessment Was Based Solely Upon Illegally Obtained Evidence, the Assessment Has Lost Its Presumption of Validity.

It is well settled that the Commissioner's assessment establishes a *prima facie* case of tax liability; *if* not impeached, this presumption of validity will justify recovery for the Internal Revenue Service. *United States v. Rindskopf*, 105 U.S. 418 (1881); *United States v. Lease*, 346 F.2d 696 (2nd Cir. 1965). In order to defeat the assessment's presumption of validity, the taxpayer must establish that the assessment was erroneous or incorrect. *United States v. Lease, supra.*

In the case at bar, respondent has demonstrated that the petitioners' assessment is not entitled to the presumption of validity. In the pretrial conference order, the parties stipulated that the assessment against the

respondent was based solely upon items seized by the Los Angeles Police Department and upon conversations had with representatives of the Los Angeles Police Department relating to the contents of the items seized (A. 17-18). Therefore, the sole basis of the assessment was evidence seized in violation of the taxpayer's Fourth Amendment rights. The district court did not depart from the well recognized rule that initially the assessment is presumptively valid. Rather, the court found, based upon stipulated facts, that where an assessment is predicated completely on unlawfully seized evidence, the assessment is stripped of its presumption, and, as such, there is no further presumption for the taxpayer to rebut (A. 47-65).

The respondent did not merely allege that the assessment was invalid or illegal; through the procedural device of the pretrial conference order, he has gone forward to establish that the assessment was based solely on unconstitutionally obtained evidence. Since the only evidence submitted by the Government throughout the course of these proceedings was this very same unconstitutionally obtained evidence, the respondent-taxpayer overcame the presumption of correctness which attaches to the underlying assessment. Thus, the respondent-taxpayer rebutted the presumption of correctness, thereby shifting the burden of going forward to the Government.

In *Suarez, supra*, the Tax Court was faced with the issues of the presumptive validity of a proposed assessment based completely upon unlawfully obtained evidence, and the placement of the respective burdens of proof and of going forward. The court therein observed that it was not confronted with a determination

predicated upon evidence inadmissible under the usual rules of evidence, *e.g.*, hearsay. On the contrary, the court in *Suarez* emphasized that the proposed assessment rested solely on evidence obtained in violation of the taxpayer's Fourth Amendment rights. The court held (at 814):

> "Where infringement of constitutional rights are involved, we are convinced that the determination in a statutory notice should be carefully scrutinized and that some sanctions should be imposed to discourage the Commissioner's use and reliance on constitutionally inadmissible evidence."

With regard to the allocation of both the burden of proof and the burden of going forward, the *Suarez* court held (at 814-815):

> ". . . [I]n the realm of the criminal law, where the exclusionary rule was born, suppression of tainted evidence serves as an effective disincentive to its use by the Government because the Government has the burden of proof. Clearly, such disincentive does not exist in a civil tax case if the sole action taken is to suppress such evidence and the burden of proof and of going forward with the evidence remains on the taxpayer. We, therefore, conclude that in addition to suppression of the tainted evidence here, we must take further action . . .
>
> "We believe that the respondent [Commissioner] has the duty in the case at bar not only to cleanse the evidence but also, if he wishes to be sustained in his determination herein, to present evidence to support it which is free of unconstitutional taint.
>
> "We therefore conclude and hold that the determination before us, based entirely on constitutionally inadmissible evidence, carries no presumption of correctness. Because the presumption of correctness has disappeared, the respondent [Commissioner] now has the burden of going forward with the proof to establish the existence of a deficiency with independent evidence, separate and apart from the tainted evidence."

The respondent herein filed a complaint seeking a refund of the $4,940.00 seized by the local police and levied upon by the Government; the petitioners denied liability on the claim for refund, and, counterclaimed for $84,210.66. Since the Government is seeking to establish the validity of the assessment in its counterclaim, the counterclaim is tantamount to an independent collection suit instituted by the taxing authority. The procedural burden placed upon a taxpayer defending against such a collection suit has been discussed in detail in *Bar L Ranch v. Phinney*, 426 F.2d 995 (5th Cir. 1970), wherein the court held (at 998-999):

> "We have found only one Court of Appeals case, United States v. Lease, 2 Cir. 1965, 346 F.2d 696, which discusses the burden of proof on a taxpayer who challenges the correctness of a tax assessment as a defense in a collection suit. The Second Circuit concluded that the taxpayer has the easier burden of proof to show only that the Government computations are arbitrary. The court said the burden is then upon the Government to show whether any deficiency exists, and, if so, in what amount; it is not encumbent upon the taxpayer to prove the correctness of the item concerned. Accord, *Spivack v. United States*, S.D. N.Y. 1966, 254 F.Supp. 517, 522, aff'd 370 F.2d

612, cert. denied, 387 U.S. 908, 87 S.Ct. 1690, 18 L.ed.2d 625 (which, like the instant case, involved a counterclaim by the Government).

"Requiring taxpayers in collection suits to meet the more rigorous burden of proof demanded in refund cases would not be warranted by the rationale of those cases:

> 'Since the action for refund of taxes is in the nature of a common law action for money had and received and is governed by equitable principles, the burden of proof is on the taxpayer to prove not only that the determination of the tax is wrong, but to produce evidence from which another and proper determination could be made.' *David v. Phinney*, 5 Cir. 1965, 350 F.2d 371, 376, quoting 10 Mertens Law of Federal Income Taxation, Section 58A.35, pp. 98-99.
>
> "We therefore agree with the conclusion of *United States v. Lease, supra*, that a taxpayer defending a collection suit need only show the Government's assessment was arbitrary and that the burden is then on the Government to show whether any deficiency exists and, if so, in what amount."

In the case at bar, the respondent-taxpayer established that the assessment was based solely upon unconstitutionally obtained evidence. The district court, therefore, correctly determined that the assessment lost its presumption of validity. At no point in the proceedings below did the petitioners offer any untainted evidence which would be admissible at trial. As the court held in *Suarez, supra*, it was incumbent upon the Commissioner to go forward with untainted evidence to establish

his position once the assessment lost its presumption of validity. Since the petitioners did not offer any untainted evidence, the assessment was fatally defective.

Subsequent to the unconstitutional seizure of evidence (including the $4,940.00 in cash belonging to the respondent), petitioners assessed a wagering tax in the sum of $89,026.09 against the respondent. Pursuant to this assessment and the power accorded to him by Section 6331 of the Code, the Commissioner levied upon the $4,940.00 in cash. The seizure of this cash is the basis of the respondent's refund suit.

Petitioners contend that the district court erred in finding for respondent on the refund portion of this action, arguing that with respect to his claim for refund of $4,940.00, respondent must prove not only that the determination was incorrect, but in addition, he must produce evidence from which another determination can be made. In the ordinary tax refund case, this is a correct description of the allocation of the burden. However, unlike most tax refund actions, here the respondent was placed in the position of having to file a claim for refund as a direct result of the violations of his Fourth Amendment rights. Since respondent demonstrated that the underlying assessment was based completely upon unconstitutionally seized evidence, and since the petitioners did not offer any additional untainted evidence, it follows *a priori* that respondent should be entitled to a full refund of all money seized pursuant to the invalid assessment. In effect, the respondent-taxpayer has demonstrated the following:

1. All evidence utilized by the petitioners was illegally obtained:

2. Petitioners determined that the respondent-taxpayer was engaged in bookmaking activities

solely as a result of the illegally obtained evidence;

3. The tax in question is an excise tax on bookmaking activities; and

4. Since there was no admissible evidence whatsoever to establish bookmaking activities, it necessarily follows that there is no wagering tax liability predicated upon bookmaking activities, and, as such, the respondent-taxpayer is entitled to prevail in these proceedings.

Thus, the respondent-taxpayer has done everything necessary to prove that he is not liable for any wagering taxes, save and except that he has not physically testified with respect to his alleged participation in bookmaking activities. Since there was no admissible evidence in the record of such underlying activities, and since one cannot be presumed to be a bookmaker, it necessariiy follows that the respondent-taxpayer has met his burden and is entitled to a full refund.

Petitioners cite *Compton v. United States*, 334 F.2d 212 (4th Cir. 1964), in support of their position that a civil wagering tax assessment is not invalid even though based *almost entirely* upon illegally obtained evidence (Brief for Petitioners at 23). However, unlike *Compton*, the assessment herein was based *solely* upon illegally obtained evidence. Thus, the Fourth Circuit was not presented with the precise issue which is before this Court, *i.e.*, whether a wagering tax assessment may be based *solely* upon illegally obtained evidence. In *Compton*, there was apparently a sufficient amount of untainted evidence upon which the Government could establish gambling activities. This untainted evidence in and of itself required the taxpayer to come forth in order to ascertain her proper tax liability. In the case at

bar, the respondent-taxpayer should not be required to come forth with any additional evidence as there is no admissible evidence in the record whatsoever with respect to his alleged bookmaking activities, and, as such, there is no underlying basis for a wagering tax assessment.

IV

Where the Underlying Conduct Giving Rise to the Assessment Is Alleged Criminal Activity, a Taxpayer Should Not Be Required to Forfeit His Fifth Amendment Rights in Order to Obtain a Tax Refund.

On the narrow and limited facts of the case at bar, (assessment based solely on unconstitutionally seized evidence, which evidence itself suggests criminal violations) requiring the respondent-taxpayer to come forth with additional evidence in order to establish the propriety of his claim for refund would violate his Fifth Amendment rights. The alleged conduct giving rise to the assessment was bookmaking, which is made criminal by the following statutes: West's Cal. Penal Code, Section 337a (West 1970); 18 U.S.C. Section 1955. By forcing the respondent-taxpayer to do more than attack the validity of the underlying assessment, the taxpayer must choose between asserting his Fifth Amendment rights or placing himself in a position of criminal jeopardy in order to obtain a civil refund. This Hobson's choice is a direct result of the normal procedural burden allocation in the refund action. However, where a civil tax assessment is based solely on unconstitutionally seized evidence, and where the underlying activity is alleged criminal conduct, the Court should not impose a procedural burden which would require the taxpayer to forfeit his Fifth Amendment rights.

In *Boyd v. United States,* 116 U.S 616 (1886), a taxpayer's property was seized for violation of federal revenue laws, and a civil forfeiture action was brought against the property. The statute therein offered the taxpayer an election between producing a certain incriminating document or forfeiting the goods in the civil proceeding. The Court held that this choice was violative of the taxpayer's Fifth Amendment rights. (*Boyd* at 631-635).

Similarly, in *Spevack v. Klein,* 385 U.S. 511 (1967), the Court quoted from *Malloy v. Hogan,* 378 U.S. at 8, with approval as follows (at 514):

> ". . . the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence."

In defining the word "penalty" used by the *Malloy* Court, the court in *Spevack* held (at 515):

> "In this context 'penalty' is not restricted to fine or imprisonment. It means, as we said in *Griffin v. California,* 380 U.S. 609, 14 L.ed.2d 106, 85 S.Ct. 229, the imposition of any sanction which makes assertion of the Fifth Amendment 'costly.' "

And in *Garrity v. New Jersey,* 385 U.S. 493 (1967), the Court held that the petitioner could not be forced to make a choice between self-incrimination and job forfeiture. The Court therein stated (at 497):

> "The choice given the petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent."

If the respondent-taxpayer must prove not only that the assessment is invalid, but must also come forth with additional evidence, such a requirement would result in an unconstitutional application of the burden of proof. The reason therefor is that the respondent-taxpayer would be placed in a position of incriminating himself, thereby losing the protections afforded by the Fifth Amendment. The respondent would not be able to establish his claim for refund without making himself vulnerable to federal or state prosecution for illegal gambling activity.

Respondent reiterates that the procedural allocation of the burden of proof in the "normal" refund suit (one which is not based on illegal activity) is not constitutionally suspect. However, when, as in this case, the underlying conduct giving rise to the refund action is made criminal by local or federal law, requiring the taxpayer to do more than demonstrate the invalidity of the underlying assessment forces the taxpayer to choose between asserting his Fifth Amendment right and incurring substantial liability to the Government. Such a choice is not constitutionally permissible.

Conclusion.

For the reasons set forth above, the exclusionary rule must be applied to this case in order to deter future violations of the Fourth Amendment. The respondent, therefore, respectfully urges this Honorable Court to affirm the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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